United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1429

To be argued by
JEFFREY D. ULLMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1429

UNITED STATES OF AMERICA,
Appellant,

—v.—

ELISEO SANCHEZ RUEDA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal by the United States of America, pursuant to Title 18 United States Code §3731, from an order entered on August 31, 1976, by the United States District Court for the Southern District of New York (Hon. Kevin Thomas Duffy, J.), which granted, after an evidentiary hearing, defendant-appellee Eliseo Sanchez

Rueda's motion to suppress evidence seized incident to his arrest. The decision of Judge Duffy has not been reported and is reproduced in the Government's Appendix at A-77.

Indictment 76 Cr. 625, filed July 6, 1976, charged Eliseo Sanchez Rueda, a/k/a "Eugardo Orozco", and Jesus Pena P., a/k/a "Alphonzo Camargo", a/k/a "El Viejito", in one count with conspiracy to import a narcotic controlled substance (cocaine), in violation of 21 U.S.C. §§ 846 and 963.

Defendants Sanchez Rueda and Camargo timely moved to suppress all tangible evidence seized, and statements made, as having been incident to unlawful warrantless arrests accomplished without probable cause. A suppression hearing commenced on August 19, 1976, and concluded on August 26, 1976, at which time the District Court rendered findings of fact and conclusions of law.

The District Court granted defendants' motions to suppress in their entirety. Judge Duffy found insufficient probable cause to sustain either warrantless arrest and found further that the written consent executed by Camargo, which permitted the search of his hotel room, was involuntarily extracted from him by agents of the federal Drug Enforcement Administration ("DEA").

Pursuant to 18 U.S.C. § 3731, the Government has appealed that portion of the District Court's determination that concluded there was no probable cause to arrest Sanchez Rueda. The Government has not appealed the District Court's findings that the search of Camargo's room was conducted pursuant to an involuntarily-extracted consent (Government's brief, at 4), and has previously conceded the illegality of the separate search of Sanchez Rueda's hotel room subsequent to his arrest (Id., at 7).

Statement of Facts

Suppression Hearing

At the suppression hearing, Andres Amador, testifying on behalf of the Government, identified himself as a Special Agent of the DEA, currently assigned to San Juan, Puerto Rico (Tr. 25).

On June 24, 1976, at San Juan International Airport, United States Customs Agents detained a Colombian woman named Ana Lupe Rodriguez, traveling with a passport under the name of Cynthia Maria McGlinn, when three kilograms of cocaine were seized from a false-bottomed pink suitcase belonging to her (Tr. 26, 78).

Rodriquez was placed under arrest at the airport and removed to DEA offices in Puerto Rico (Tr. 26). She was thereupon persuaded by Agent Amador to cooperate with the Government in an effort to arrest her accomplices (Tr. 27). At the time of her initial questioning, Rodriguez was advised that, having been caught in possession of three kilograms of cocaine, she was in substantial trouble (Tr. 80). She was also advised that, if she cooperated with the agents by implicating accomplices, her cooperation might well help her in her predicament (Tr. 80-82).

Thus motivated to help herself out, she proceeded to describe to the agents how she came to possess the suitcase in question and what were her plans for the cocaine secreted therein.

She stated that she had received the suitcase and passport from defendant Sanchez Rueda, and was on her way to the McAlpin Hotel in New York where, she stated, Sanchez Rueda would meet her later on to reclaim the suitcase (Tr. 27-28). She told the agents, further, that she had received the suitcase on June 22, 1976, and had traveled from Bolivia, via Colombia and Curacao, to Puerto Rico, where she was finally arrested (Tr. 27). The final destination on her ticket was Philadelphia (Tr. 27).

Agent Amador also testified having been told by Rodriguez* that, at Sanchez Rueda's behest, she had previously "tested" the passport and itinerary in a prior trip to New York in February, 1976, in the company of an old man described as "El Viejito", who also used the name "Jesus Pena". Rodriguez purportedly described him as Sanchez Rueda's right-hand man (Tr. 28-30).

The day following her arrest, June 25, 1976, Rodriguez proceeded to New York in the company of DEA agents in order to arrange to make a "controlled delivery" of the suitcase to Sanchez Rueda (Tr. 30-31). Upon arrival in New York, she was taken to DEA's New York Regional Office where she gave descriptions of Sanchez Rueda and the old man and was furnished with a body recording device.

Rodriguez was thenceforth taken to the McAlpin Hotel where she registered (Tr. 31). DEA agents set up surveillance in an adjoining room (Tr. 33). Before meeting Sanchez Rueda that evening, Rodriguez telephoned her mother in Colombia shortly after 11 p.m., and was informed that Sanchez Rueda had been calling and asking for her (Tr. 33).

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* Rodriguez was never produced by the Government to testify at this hearing.

Thereupon, Rodriguez, outfitted with two recording devices, proceeded to the hotel lobby where she was observed by DEA agents meeting a man who matched the description she had given of Sanchez Rueda (Tr. 34). The couple then left the hotel and subsequently returned after an interval, proceeding to a room on the hotel's twenty-first floor (Tr. 34).

Agent Amador admitted that, while he monitored the conversations between Rodriguez and her companion, he could hear only part of what was being said (Tr. 58). The transcription of these conversations, in fact, reveals that Sanchez Rueda displayed dismay and agitation over the tardiness of Rodriguez' arrival (App. A-60). He was upset because she was delayed, and she explained that she had missed the plane in Colombia (App. A-62).

But the subject of narcotics never arose (Tr. 87). Rather, the entire tenor of the conversation consisted of Rueda's concern about Rodriguez' delay in arrival, and was interspersed with numerous expressions of endearment, because the two had been lovers (Tr. 91).

At one point, agents overheard Sanchez Rueda state to Rodriguez "I think you are lying to me" (App. A-67, A-75). Purportedly based upon their concern

for Rodriguez' welfare*, the agents proceeded to move in to make an arrest (Tr. 34, 100). Rodriguez and Sanchez Rueda by this time had exited his room and were proceeding down the hall on the way to her room when agents stepped in to make the arrest (Tr. 84, 106-107).

It is undisputed that the arrest occurred in the hallway, and thus before any controlled delivery took place (Tr. 83). It is also undisputed that none of the monitored conversations between Rodriguez and Sanchez Rueda revealed any discussions whatever that related to narcotics transactions (Tr. 87).

Sanchez and Rodriguez were both placed under arrest, and Sanchez Rueda was searched for weapons and advised of his rights (Tr. 35, 48). He was searched a second time, and a matchbook was seized from his pants pocket (Tr. 38). The matchbook contained a telephone number and room listing, which subsequently turned out to be the hotel number of co-defendant Camargo.

In terms of any independent corroboration of Sanchez Rueda's involvement in narcotics transactions,

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* The District Court expressed doubt about the credibility of this "fear" (A. 80).

Special Agent Amador testified, the only information possessed by DEA which led to his arrest was that provided by Rodriguez (Tr. 114).

The District Court's Findings and Opinion

At the conclusion of the suppression hearing, Judge Duffy rendered findings of fact and conclusions of law regarding the arrests of, and seizures from, Sanchez Rueda and co-defendant Camargo (Tr. 358-367; App. A. 78-87).

The Court below found that, as recounted supra, on June 24, 1976, while attempting to pass through customs at the International Airport in Puerto Rico, a woman named Ana Lupe Rodriguez was found in possession of a false-bottomed piece of luggage containing three kilograms of cocaine (A. 79). Agreeing to cooperate with DEA agents, Rodriguez told them that she had previously received a bogus passport and, on June 22, the instant suitcase from defendant Sanchez Rueda, and that she had traveled by various intermediate stops from Colombia to Puerto Rico.

Noting that the Government had failed to produce Rodriguez as a witness, the District Court questioned the

basis of the agents' information that Sanchez Rueda and "El Viejito", her previous traveling companion, were partners. The agents, however, did receive a description of Sanchez Rueda from Rodriguez (A. 79).

Regarding the circumstances of Sanchez Rueda's arrest, the District Court found that a "controlled delivery" of three kilos of cocaine had been arranged at the McAlpin Hotel on June 25, 1976, upon Rodriguez' arrival in New York. She was equipped with recording devices and DEA agents were stationed in the adjoining room. During that same evening, agents observed her meet a man fitting the description she had given of Sanchez Rueda.

Thereupon, the DEA agent explained that his decision to make the arrest was based upon his becoming "fearful" that the woman might be exposed to physical danger. The District Court, however, expressed incredulity at the agent's attempted justification of his "fear". The Court also noted that Sanchez Rueda had been arrested in the hotel hallway, and that no delivery of cocaine transpired between Rodriguez and Sanchez Rueda.

Thereupon, in regard to the arrest, the District Court rendered the following conclusions of law:

"The arresting agent testified at the hearing that the sole factual basis for determining the probable cause to arrest Sanchez Rueda were statements by Ana Lupe Rodriguez. These statements by an individual whose reliability is totally unknown to the agents, who was caught with incriminating evidence, and whose statements tend to inculpate another individual, can hardly be a sufficient basis for probable cause. (See Wong Sun. v. United States, 371 U.S. 471 (1963) where the Supreme Court found an arrest to be illegal on facts similar to these.) Uncorroborated information from a person of unknown reliability is simply not a basis for probable cause.

"Certainly the Kel transmissions can offer no corroboration. First, it is clear that the government agents admitted that they did not monitor all of the transmission. Second, there is nothing on the tape of that transmission, which indicates that Rueda had any knowledge of the woman's involvement with illicit drugs.

"On all the evidence and particularly the credibility of the various witnesses, I find that the arrest of Sanchez Rueda was made without probable cause." (A. 80-81)

Having thus found Sanchez Rueda's arrest to have been illegal, the District Court went on to find the matchbook seized from him to be a fruit of the illegality, warranting its suppression. The Court reiterated, as well, the Government's concession as to the illegality of the search of Sanchez Rueda's hotel room (A. 82).

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE WAS NO PROBABLE CAUSE FOR SANCHEZ RUEDA'S ARREST

The District Court properly concluded that there was no probable cause to sustain the warrantless arrest of Sanchez Rueda. Based upon the evidence adduced at the suppression hearing, the Court below correctly found that, not only was the informant's reliability insufficiently ascertained, but, moreover, there was insufficient independent corroboration of her information to warrant the inference that Sanchez Rueda was involved in a narcotics transaction. Upon both these determinations, the District Court was clearly correct. Wong Sun v. United States, 371 U.S. 471 (1963).

Informant's Inherent Unreliability

The District Court correctly found that the information implicating Sanchez Rueda came from a clearly unreliable source -- Ana Lupe Rodriguez -- an individual of dubious reliability, previously unknown to the authorities, who, when caught with incriminating evidence, implicated Sanchez Rueda in the hope of obtaining favorable treatment

for herself. Without further indicia of reliability, she was hardly a sufficient source to sustain a finding of probable cause.

It is clear that, before an informant's tip properly may be relied upon to establish probable cause, the tip first must meet the "two-pronged" test of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), that (1) the informant be demonstrated to be a reliable person, and that (2) the underlying circumstances by which the information was obtained were such that it was probably accurate. United States v. Canieso, 470 F.2d 1224, 1229 (2d Cir. 1972).

Applying the Aguilar - Spinelli standard in this case, it is manifest, as the District Court found, that, not only was this informant inherently unreliable, but, moreover, she possessed significant motivation to falsely implicate another in order that she might obtain lenient treatment.

Rodriguez was arrested in possession of three kilograms of cocaine in Puerto Rico. Upon her arrest, she was informed that, by cooperating in naming accomplices, she might help herself out of her predicament. Clearly, under the facts of this case, where she had

already been arrested "red-handed", it may not seriously be claimed that her implication of Sanchez Rueda was truly a declaration against her penal interest, such as would tend to bolster her reliability. United States v. Harris, 403 U.S. 573 (1971). Indeed, the opposite interpretation is more likely.

Under these circumstances, the usual indicia of reliability that attach to a co-conspirator's admissions against penal interest must be viewed with a somewhat more jaundiced eye. Given the overwhelming evidence already possessed against her, Rodriguez' admission, made in anticipation that she would benefit by her cooperation, hardly constitutes an admission against her own penal interest.

Rodriguez, thus, had a strong motive to help herself by fabricating someone else's involvement. As this Court has commented in this context:

> "Moreover, the Supreme Court has noted that when certain kinds of [white-collar] crimes are involved, informants are 'much less likely' to lie than 'in narcotics cases or other common garden varieties of crime ... .' Jaben v. United States, 381 U.S. 214 (1965)." United States v. Sultan, 463 F.2d 1066, 1069 (2d Cir. 1972).

Thus, while the Government relies upon United States v. Miley, 513 F.2d 1191, 1204 (2d Cir. 1975) for

the unexceptionable proposition that a participant in a crime is "no informant in the usual sense ...", it still must be recognized that such direct involvement, while probative, is not conclusive as to such person's reliability.

Indeed, this Court has determined that, in evaluating the reliability of accomplice statements under the Aguilar - Spinelli standard, such statements, while entitled to serious consideration, are "not conclusive on the matter of ... trustworthiness ...".*

Clearly, then, under the facts of this case, Rodriguez' statements, coming from a confessed participant seeking lenient treatment, are more closely analogous to the statements of a professional informant seeking a quid pro quo in return for information. Such statements may hardly be considered as reliable as those from a mere witness or victim. United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975). Indeed, the usual indicia of reliability that attach to these latter classes of informants clearly does not apply under the circumstances of this case.

Accordingly, the statements of Rodriguez must be judged under the Aguilar - Spinelli standard of reliability regarding unsubstantiated informants. The

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* United States v. Viggiano, 433 F.2d 716, 718 n.3 (2d Cir. 1970).

status of being a participant or co-conspirator is not a talisman in whose face the demands of Aguilar and Spinelli evaporate. Such status, in and of itself, is not conclusive as to the informant's reliability, but is merely one factor warranting consideration in light of the overall circumstances of the case. United States v. Rodriguez, 532 F.2d 834, 837 (2d Cir. 1976).

Under the present facts of this case, where the Government already possessed overwhelming evidence against her, Rodriguez' implication of Sanchez Rueda hardly may be deemed such an admission against penal interest as to conclusively vouch for her, or the statement's, inherent reliability. Thus, the District Court's rejection of her information because of her uncorroborated reliability was not clearly erroneous. United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976).

Lack of Corroboration

The District Court properly concluded that, in light of the lack of independent corroboration of Rodriguez' information concerning Sanchez Rueda's involvement in narcotics transactions, the agents lacked sufficient probable cause to make an arrest.

The record clearly reflects, and the District Court so found, that while Rodriguez may have implicated Sanchez Rueda to the agents, the only apparent corroboration of his involvement with Rodriguez arose in the context of a totally innocent liason between the two at the McAlpin Hotel in New York.

Caught "red-handed" with three kilos of cocaine, Rodriguez described her impending rendezvous with Sanchez Rueda in New York, implicating him in the narcotics transaction. She provided the agents with his precise description, and, in fact, met him in the hotel lobby, a fact as susceptible of innocent as guilty interpretation.

Thereupon, the agents monitored the couple's conversation in the hotel. The testifying agent conceded that, while the entire conversation was not monitored, there was no mention of any narcotics transactions in what was overheard. Rather, the conversations consisted of Sanchez Rueda's expression of concern and agitation over Rodriguez' delay in arrival and her expressions of endearment towards him.

It is indeed curious, if not utterly inconsistent with Rodriguez' tip, that, in light of his concern over her delay, Sanchez Rueda makes no mention of the

cocaine, nor does he manifest any intention of immediately consummating the transaction.

Moreover, these conversations did not occur in Rodriguez' hotel room, where the cocaine was secreted, but, rather, in Sanchez Rueda's. The arrest, in fact, occurred after the couple had left his room and were in the hotel hallway.

Indeed, the DEA agent who testified related that the event precipitating the arrest had nothing to do with the cocaine delivery, but, rather, with the agent's "fear" for Rodriguez' safety (a "fear", incidentally, which the District Court found unpersuasive).

It is clear, therefore, that, at most, the only conduct corroborated was of the most purely innocuous sort -- the meeting of two lovers at a hotel in New York. It is manifest that, without more, innocent-appearing conduct must be presumed innocent and cannot be an element in the determination of probable cause. United States v. McNally, 473 F.2d 934, 939 (3d Cir. 1973); United States v. Chadwick, 532 F.2d 773, 784 (1st Cir. 1976); United States v. Jit Sun Loo, 478 F.2d 401 (9th Cir. 1973).

Certainly, the situation encountered by the Sixth Circuit in United States v. Jackson, 533 F.2d 314

(6th Cir. 1976) bears striking similarity to the case at bar. Jackson, as this case, involved a tip by an informant of dubious reliability regarding a narcotics transaction scheduled to occur in Jackson's hotel room, in which the informant was a prospective participant. The only corroboration by the police was of purely innocent conduct on Jackson's part.

Upon these facts, the Sixth Circuit held that where the informant's tip regarding the narcotics delivery was not confirmed by any criminal activity on the defendant's part, and where no independent corroboration of the transaction, or of defendant's involvement, was unearthed, the warrantless arrest of Jackson outside her hotel room, similar to Sanchez Rueda's arrest, was plainly without probable cause.

The Sixth Circuit took note that no independent police knowledge existed to indicate that Jackson was involved generally in narcotics transactions. Most importantly, the crucial component in establishing probable cause -- involvement in a drug transaction -- was in no way verified by police observations, which is a clear requirement of such corroborating information. Whitely v. Warden, 401 U.S. 560, 567 (1971).

The police "corroboration" in Jackson, as in the instant case, consisted of nothing more than confirmation of innocent behavior, or suspicious behavior at most. That confirmation in no way related to any criminal activity on her part. Thus, the Court concluded, there was insufficient corroboration upon which to predicate an arrest:

> "The agents may have had reason to be suspicious of ... Jackson, to place her under surveillance, or even to attempt to arrange a purchase of heroin from her; however, mere unconfirmed suspicion is not the criteria upon which probable cause is based." United States v. Jackson, supra, 533 F.2d at 319.

See also, United States v. Jordan, 530 F.2d 722 (6th Cir. 1976); United States v. Larkin, 510 F.2d 13 (9th Cir. 1974); United States v. McNally, supra.

Jackson, then, clearly points to the proper resolution of this case. The only confirmation the agents received was of purely innocent conduct on Sanchez Rueda's part. There was no indication in his conversations with Rodriguez of his involvement in narcotics transactions or even knowledge of her involvement; indeed, in light of their purported importation of a large amount of cocaine, his utter failure to make inquiry regarding safe delivery is yet another factor militating against his involvement.

Be that as it may, while the agents may well have possessed sufficient information to stop Sanchez Rueda for questioning, or to continue surveillance, the information they possessed at the time of arrest clearly did not constitute sufficient probable cause to believe he had, or was then committing, a crime. United States v. Rodriguez, supra, 532 F.2d at 837-838.

Thus, in the instant case, the facts reveal that the tip by Rodriguez, hardly a reliable informant, was confirmed only in the most innocent respects by police surveillance. Narcotics, indeed, was never even mentioned by Sanchez Rueda or Rodriguez while being monitored...

In this regard, in evaluating the weight to be placed on the information supplied by an informant and its subsequent corroboration as a basis for probable cause, the appropriate standard has been enunciated by Judge Friendly:

> "The lesson we draw from all this is that Aguilar applies with full rigor only when ... the arrest depends solely on the informer's tip. When a tip not meeting the Aguilar test has generated police investigation and this has developed significant corroboration or other 'probative indications of criminal activity along the lines suggested by the informant,' [citation omitted], the tip, even though not qualifying

> under Aguilar, may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause." [Citation omitted.] United States v. Canieso, supra, 470 F.2d at 1231 (emphasis in original).

Clearly, then, under these standards, in light of this informant's inherent unreliability, by virtue of her avowed self-interest in providing inculpatory information regarding Sanchez Rueda, as well as the agents' failure on surveillance to corroborate her information through any incriminating activity on Sanchez Rueda's part*, the District Court was clearly correct in its determination that the agents possessed insufficient probable cause to warrant Sanchez Rueda's arrest. The Court's suppression of the matchbook seized from him was, thus, clearly proper. Wong Sun v. United States, supra.

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* It was admitted at the suppression hearing that the sole information possessed as to Sanchez Rueda came from Rodriguez.

Conclusion

The order appealed from should be affirmed.

Dated: New York, New York
December 15, 1976

Respectfully submitted,

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C. 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant

against

ELISEO SANCHEZ RUEDA,

Defendant-
APPELLEE

Index No. 76-1429

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
400 C.P.W., New York, N.Y. 10025

That on the 15th day of December, 1976 deponent served the annexed

on United States Attorney, S.D.N.Y.
attorney(s) for Appellant
in this action at 1 St. Andrew's Plaza, New York, New York 10007
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 15th day of December, 1976

Edward M. Chikofsky
The name signed must be printed beneath
EDWARD M. CHIKOFSKY

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